Supreme Court, U.S.
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No. 03-151

In The Supreme Court Of The United States

BETTY MITCHELL, Warden,

Petitioner,

v.

WILEY DAVIS, JR.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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INTRODUCTION

As the Warden established in her Petition, this case offers the Court an ideal vehicle to clearly define the extent to which the Constitution requires a state trial judge to *affirmatively* instruct jurors on jury unanimity in capital sentencing—a vital, but unsettled, question of capital habeas jurisprudence. Rather than addressing the confusion that clouds this area of the law, however, Respondent presents two arguments—which amount to little more than a distilled recital of the panel majority's opinion—as to why this Court should decline to review the decision below. First, Respondent asserts that Petitioner is merely attempting to "manufacture . . . a conflict with *Jones*" *v. United States*, 527 U.S. 373 (1999), by "mischaracteriz[ing] . . . the legal issues considered by the Sixth Circuit." Resp. Br. at 6-7. In particular, Respondent argues that the decision below was a correct application of *Mills* and that "[t]here is absolutely no intercircuit or intracircuit conflict with *Jones* because the court below did not find constitutional error for the failure to instruct" the jury on unanimity. Resp. Br. at 12. Second, Respondent argues that the alleged uniqueness of the instructions and verdict forms at issue here also insulates the panel majority's decision from this Court's review. *Id.* at 8.

Respondent is wrong on both counts. Despite Respondent's repeated attempts to downplay it as unexceptional, the panel majority's decision below represents an unprecedented extension of this Court's decision in *Mills v. Maryland*, one that puts the Sixth Circuit in direct conflict with every other circuit that has considered that case. *Mills* simply holds that a State cannot require jurors to limit their consideration of mitigating factors to only those factors that they unanimously agree are present, an issue that, as Judge Boggs noted in dissent below, is "a far cry from the situation presented in this case." *Davis v. Mitchell*, 318 F.3d 682, 694 (6th Cir. 2003) (Boggs, J., dissenting). *See also Mills v Maryland*, 486 U.S. 367, 374-375 (1988). Relying on *Mills*, however, the panel majority overturned Respondent's capital

sentence, not because anything the trial judge actually said in the jury instructions violated *Mills*' prohibition, but rather because the majority believed that *Mills* required the trial judge to say more.

It is Respondent who, thus, "mischaracterizes" the panel majority's decision by repeatedly claiming "the court did not reverse for failing to give" certain instructions. Resp. Br. at 4, 5, 7, 12. Indeed, with the decision below, the Sixth Circuit now requires, on constitutional grounds, three new jury instructions in Ohio. That is, the Sixth Circuit tranformed the *prohibition* in *Mills* against certain capital sentencing schemes into an *obligation* for State trial court judges to affirmatively instruct capital jurors on jury unanimity. No other federal circuit, however, has read *Mills* to constitutionally require such jury instructions (and certainly no circuit has concluded the right to such instructions is "clearly established" for AEDPA purposes).

Respondent's assertion that "uniqueness" insulates the decision below from review is similarly flawed. Contrary to Respondent's claim, scores of prisoners in Ohio received their capital sentences based on jury instructions virtually indistinguishable from those used at Respondent's trial. The panel majority's idiosyncratic view of the Eighth Amendment thus threatens the constitutionality and finality of every one of these sentences. For these reasons—to ensure uniformity among the federal circuits on the Eighth Amendment requirements regarding unanimity instructions; to provide much-needed guidance on these vitally important and frequently recurring questions of capital habeas jurisprudence; and to prevent the Sixth Circuit's unwarranted constitutional interpretation from wrongly undermining scores of currently-imposed capital sentences—the Warden respectfully requests this Court's review.

Before further discussing these issues, however, the Warden would like to apologize to the Court for an inadvertent misstatement in the Petition. In relying on the federal district court's Factual Statement to construct her Statement of the Case, the Warden incorrectly stated that Respondent was sentenced to death for rape, murder and kidnapping.[1] In fact, he was sentenced "to death for [her] brutal kidnapping and murder." *Davis*, 318 F.3d at 685. Although immaterial to the questions presented in the Petition, Petitioner apologizes for incorrectly stating that Respondent was convicted of rape. This inadvertent factual misstatement, however, does nothing to minimize either the importance of the issues presented here, or the need for immediate review.

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[1] The federal district court's opinion on habeas stated the following:

On December 5, 1991, the Cuyahoga County Grand Jury indicted Davis on a six-count indictment. The first two counts charged aggravated murder under Ohio Revised Code § 2903.01(A) and (B). Each count carried three felony-murder capital specifications—kidnapping, aggravated robbery, and rape or attempted rape. The remaining counts charged kidnapping, rape, aggravated robbery, and having a weapon while under a disability. Davis was tried before the Cuyahoga County Court of Common Pleas. The jury convicted Davis on all counts and all specifications thereto. *** In 1995, the appellate court affirmed Davis's conviction .... In 1996, the Ohio Supreme Court affirmed both Davis's conviction and sentence. *Davis v. Mitchell*, 110 F. Supp.2d 607, 612-613 (N.D. Ohio 2000). App. 37a-38a.

ARGUMENT IN RESPONSE

I. By Improperly Extending The Holdings Of *Mills* And *McKoy*, The Panel Majority Below Created Both An Inter-Circuit And Intra-Circuit Conflict Regarding The Extent To Which A Judge Must Instruct The Jury On Unanimity In The Capital Sentencing Process.

Both the Warden and the Respondent agree "that *Mills* is the clearly established and applicable controlling authority" in this case. Resp. Br. at 8. As such, under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), Respondent was entitled to federal habeas relief only if the state court decision was "contrary to" or "an unreasonable application of" *Mills*. 28 U.S.C. § 2254(d). AEDPA's standard is not in question here. Rather, what makes this case worthy of this Court's attention is that the panel majority below improperly extended *Mills*' reach—creating conflicts with its sister circuits and confusion within its own circuit—in determining that the state court's decision was "clearly 'opposite to that reached by [the Supreme] Court on a question of law' in the *Mills* and *McKoy* cases." *Davis*, 318 F.3d at 685 (quoting *Williams v. Taylor*, 529 U.S. 362, 413 (2000)).

As the Warden's Petition (and Judge Boggs below) observed, "'the Ohio Supreme Court's decision in upholding these instructions certainly does not constitute an unreasonable application of any clearly established precedent of [this Court],'" as *Mills* and *McKoy* have simply never been interpreted to require the instructions mandated by the decision below. Pet. at 11 (quoting *Davis*, 318 F.3d at 691 (Boggs, J., dissenting)). Rather than addressing this unprecedented extension of *Mills*, however, Respondent

merely asserts that the Warden "has misstated and mischaracterized the legal basis of the court's opinion." Resp. Br. at 8. Respondent is wrong.

Contrary to Respondent's assertion, the decision below cannot be characterized as the panel majority "merely applying" well-settled law from *Mills*. *See* Resp. Br. at 6. Neither party disputes that a State cannot require jurors to limit their consideration of mitigating factors during capital sentencing deliberations to those mitigating factors that the jury unanimously finds are present. *Mills*, 486 U.S. at 374-375; *McKoy v. North Carolina*, 494 U.S. 433, 435 (1990). The panel majority derived from these decisions, however, a substantially broader and more intrusive principle that requires state trial judges to *affirmatively instruct* jurors regarding certain aspects of unanimity in the capital sentencing process.

That is, where the federal circuits have uniformly read *Mills* and *McKoy* to create *prohibitions* on certain approaches to capital sentencing (*i.e.*, state trial judges *must not give* instructions prohibiting an individual juror from considering any mitigating factor that the juror finds to be present), the Sixth Circuit below instead improperly transformed those holdings into affirmative *obligations* (*i.e.*, state trial judges *must give* certain instructions regarding jury unanimity). Indeed, notwithstanding Respondent's suggestion that the court was merely applying well-settled law, the decision below in fact imposed no less than three new "affirmative obligations"—each one previously unrecognized by this Court or any other federal circuit.

Although Respondent claims, "the panel did not find constitutional error due to a failure to instruct" (Resp. Br. at 4), the plain language of the decision below belies that assertion. First, the panel opinion requires that the jury be *told* "*either expressly or impliedly*, that individual jurors may

consider mitigating circumstances in the weighing process regardless of the lack of agreement with other jurors as to the presence of that factor." *Davis*, 318 F.3d at 689-690. The only possible interpretation of this language, as Judge Boggs noted in dissent below, is that "silence in instructions on the lack of a unanimity requirement for mitigating circumstances violates the Eighth Amendment," a principle that he correctly notes can be found nowhere in either *Mills* or *McKoy*. *Id.* at 695. In electing to treat silence on jury unanimity as a constitutional violation, the Sixth Circuit has thus placed itself in direct conflict with a number of its sister circuits, *see* Pet. at 14-18, a conflict Respondent chooses to simply ignore.

Second, as Respondent himself notes, under the majority's approach, State trial judges *must "'clearly inform[] the jurors* that a life verdict can be rendered by a jury that has not first unanimously rejected the death penalty.'" Resp. Br. at 7 (quoting *Davis*, 318 F.3d at 689). But, as the dissent below notes, the majority's objection to the jury instructions on this issue "is not to the order of consideration, but to the possibility that a juror may be led to believe that the jury must first unanimously reject death before considering a life sentence, rather than allowing a single juror to prevent a death sentence by creating deadlock." *Id.* at 692 (Boggs, J., dissenting). The clear implication of the majority opinion is that a State trial judge must instruct that jury on how to proceed in the event it does not unanimously agree on a death sentence.

This newly created "affirmative obligation," however, directly contradicts this Court's mandate in *Jones v. United States*, which expressly held that State trial judges are not constitutionally required to instruct the jury as to the effect of failing to unanimously reach a verdict. *Jones*, 527 U.S. at 382. In fact, noting that it has never suggested "that the Eighth Amendment requires a jury to be instructed as to the

consequences of a breakdown in the deliberative process," the *Jones* Court chastised such instructions as encouraging deadlock and undermining the strong governmental interest in unanimous verdicts. *Id.* Because it directly contradicts this Court's *Jones* decision, while mischaracterizing the *Mills* holding in this regard, the panel majority's decision has created a conflict among the circuits regarding whether the trial judge must affirmatively instruct the jurors that they need not unanimously reject the death penalty before considering a life sentence. *See* Pet. at 20-21.

The third, and final, "affirmative obligation" stems from the panel majority's finding that "the *unqualified* instruction, 'Now as you know . . . the law requires that in order for you to reach a decision all 12 of you must be in agreement' would have led a reasonable jury to apply an unconstitutional standard of unanimity" at the sentencing phase. *Davis*, 318 F.3d at 690 (emphasis added). This language thus suggests that for the previous instruction to pass constitutional muster, the trial judge must "qualify" it, *i.e.*, affirmatively instruct the jurors that they need not unanimously conclude that the aggravating circumstances do not outweigh the mitigating circumstances in order to reject a death sentence. As the Warden explained in her Petition, however, the instruction at issue here did not require unanimity as to an "interim step in the deliberations"—which would violate the Constitution under *Mills*—but instead required it only as to the overall weighing process—which has been repeatedly held permissible. *See, e.g., Zettlemoyer v. Fulcomer*, 932 F.2d 284, 307-308 (3d Cir. 1991). In this respect, the panel majority's decision created yet another conflict among the federal circuits. *See* Pet. 22-23.

Respondent fails to address any of these three new "affirmative obligations," or explain how any of them is consistent with either Supreme Court precedent or decisions from the other circuits. Instead, he merely recites the mantra

that the panel majority properly applied *Mills*, and *Jones* is therefore not at issue. Resp. Br. at 6-7, 10. Mere repetition, however, does not make that true. As the Warden, Judge Boggs and the other circuits to consider the issue have concluded, *Mills* does not *mandate any* instructions on jury unanimity—it merely *prohibits* a certain capital sentencing scheme not at issue here. By using *Mills* to create an affirmative obligation, the Sixth Circuit has misread this Court's precedent, and created a direct conflict with its sister circuits and this Court's decision in *Jones*, thereby making a capital defendant's federal constitutional rights dependent on the "luck" of geography. Accordingly, the Warden respectfully requests this Court to grant certiorari and unify the federal circuits on this vitally important and frequently recurring aspect of capital habeas jurisprudence.

II. Respondent's Remaining Reason For Denying Review Cannot Obscure The Inter-Circuit Conflicts And Intra-Circuit Confusion The Decision Below Has Created.

Respondent's only remaining argument for denying review here—that the decision below turns upon his trial's "unique instructions and jury forms" (Resp. Br. at 8)—is similarly untenable. Contrary to Respondent's claim, the decision below does not turn on any "unique" aspects of his jury instructions. Indeed, nearly identical instructions as those given in this case have been repeatedly challenged in the Sixth Circuit, as well as other federal circuits, to no avail. *See* Pet. at 14-17, 20-21, 22-25. In fact, both the majority and the dissent in a separate Sixth Circuit case offered up Respondent's own jury instructions as a model of constitutionality—a result that makes the panel majority's decision all the more remarkable. *See Henderson v. Collins*, 262 F.3d 615, 622 (6th Cir. 2001).

More importantly, Ohio courts, as well as courts across the nation, routinely use jury instructions virtually indistinguishable from those at issue here. The Sixth Circuit's inconsistent treatment of these jury instructions, therefore, has created considerable confusion among the lower courts on this issue. *See, e.g., Taylor v. Mitchell*, Case No. 1:01CV601, 2003 U.S. Dist. Lexis 4383 at *56-65 (N.D. Ohio March 3, 2003) (App. 116a-213a); *Henderson v. Collins*, Case No. C-1-94-106 (S.D. Ohio July 10, 2003) (App. 109a-213a). A simple review of the jury instructions given in these, and hundreds of other, Ohio capital cases demonstrates that Respondent's claim that his "unique" jury instructions insulate the panel majority's decision from review is unfounded.

In short, the Sixth Circuit's decision below has created a disturbing conflict among the federal circuits on the extent to which a state trial judge must instruct capital jurors on jury unanimity in sentencing—a conflict that will continue to fester with every federal habeas decision. Moreover, the decision below has called into question the validity of nearly every previously imposed Ohio death sentence because, contrary to his assertion, jury instructions identical to those used in Respondent's case have been given time and time again in capital sentencing proceedings across Ohio. The Warden has not requested this Court's review to "correct a lower court error;" rather, she respectfully requests this Court to grant certiorari to unify the federal circuits on this important and frequently recurring aspect of capital habeas jurisprudence.

CONCLUSION

For the foregoing reasons, as well as those in her Petition, the Warden respectfully urges this Court to grant certiorari and reverse the decision below.

Respectfully submitted,

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